

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICKY D. BLACKMAN)	
Claimant)	
VS.)	
)	Docket Nos. 245,461 & 248,238
U.S.D. NO. 418)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF SCHOOL BOARD'S SELF-INSURED FUND)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore on February 22, 2000. These two claims were consolidated for hearing by the ALJ.

ISSUES

The issues for Appeals Board review are:

1. Did claimant provide respondent with notice of accidental injury within the time required by K.S.A. 44-520?
2. Did claimant sustain injury by accident that arose out of and in the course of his employment with respondent?

The ALJ found that respondent abandoned its notice defense. Respondent disagrees. Respondent denied timely notice at the preliminary hearing and there is nothing in the record to suggest respondent intended to abandon any defense it had previously raised. In the interests of timeliness and administrative economy, the Board will address the issue of notice rather than remand the matter to the ALJ for determination of that issue.

FINDINGS OF FACT

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

1. Claimant began working for respondent as a school custodian on November 6, 1998. On March 19, 1999, claimant was carrying a six-foot table up a set of stairs when his foot slipped, he missed a step and fell striking his left knee against a riser. This accident is the subject of Docket No. 245,461.

2. Thereafter, claimant continued working for respondent. He described having ongoing problems with pain in his knee which was made worse with activity. This each and every working day aggravation from March 19, 1999 through June 1, 1999 is the subject of Docket No. 248,238. He testified that during this period the knee stiffened and the pain became worse. Although he attributed this pain to the work he was doing for respondent, claimant also testified that until he spoke with a physician he considered it to be a temporary problem. After reporting his injury to his supervisors, Rex Wedel and Ward Nippert, claimant was sent to Dr. James Larzalere on June 1, 1999 and was taken off work. Up until this time claimant had not missed any work due to this condition.

3. Claimant first reported that his injury was work related on or about May 15, 1999. It was not until sometime after this date that claimant was convinced his knee condition was serious.

4. The medical records introduced show a history of specific traumatic injury followed by gradual worsening of pain due to repetitive use and specify the cause of claimant's condition as work activities.

5. A letter to claimant's counsel dated September 13, 1999 by orthopaedic surgeon Milo G. Sloo, III, M.D., states:

The first question is whether or not the work activity between the time of injury, March 19, 1999, and the first of June aggravated, accelerated, or intensified the left knee condition. I think it probably did because I assume he was working during that time without the recommended restrictions that I mentioned in my initial evaluation.

CONCLUSIONS OF LAW

Respondent contends claimant failed to provide timely notice of his accidental injury. K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. The time for giving notice can be extended up to 75 days for just cause. Just cause is the issue here.

In another case, the Board said:

When dealing with injuries that are caused by overuse or repetitive micro-trauma, it can be difficult to determine the injury's cause. It is also often difficult to determine the injury's date of commencement and conclusion. In

those situations, injured workers should not be held to absolute precision when considering the requirements of notice and written claim. The test should be whether the employer was placed on reasonable notice of a work-related injury.¹

Some of the factors the Board has considered in determining whether just cause exists are:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware they have sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1 (now 51-12-2).²

Respondent contends claimant knew he was injured and attributed his injury to his work duties long before he gave notice. Claimant counters that he was able to continue working and did not know the severity of his injury until about the time he reported his accident and saw the doctor. Although the record shows a form 40 notice was posted on respondent's bulletin board and that claimant has had prior workers compensation claims, claimant also disputes that he was told or otherwise knew about his obligation to report accidents.

In Docket No. 245,461, claimant's testimony is that he suffered a specific traumatic event on March 19, 1999. In Docket No. 248,238 claimant alleges that his condition progressively worsened until he was no longer able to perform his job. Claimant's only explanation for not giving notice within 10 days of March 19, 1999 is that he was not aware of the severity of his work-related injury until so advised by his doctor. Following a preliminary hearing in Docket No. 245,561 on September 1, 1999, Judge Moore issued an order wherein he concluded that "claimant has failed to sustain his burden of proof that notice of accident was provided within 10 days; and has failed to establish just cause for enlargement of the notice period to 75 days." Consequently, preliminary hearing benefits were denied. Nothing has been added to the record since that time to persuade the Board that Judge Moore's original conclusion should be changed. Therefore, the Appeals Board finds claimant did not give notice within 10 days of March 19, 1999, and has not established just cause for his failure to report his injury within 10 days in Docket No. 245,461.

¹ Pope v. Overnite Transportation Company, WCAB Docket No. 237,559 (June 1999).

² Russell v. MCI Business Services, WCAB Docket No. 201,706 (October 1995).

The Appeals Board also finds, however, that it is more probably true than not that claimant suffered a series of accidental injuries or aggravations from his work activities after March 19, 1999. Therefore, the date of accident for determining the timeliness of the notice in Docket No. 248,238 is the last day claimant worked.³ Based upon that accident date, claimant has satisfied the 10-day limit in K.S.A. 44-520.

The Appeals Board finds claimant has proven a work-related injury from a series of mini-traumas each and every working day between March 19, 1999 and June 1, 1999, as alleged.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 22, 2000 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: Norman R. Kelly, Salina, KS
Anton C. Andersen, Kansas City, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

³ Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).